

<sup>2</sup> This accident forms the basis for Docket No. 1,020,284.

a direct and natural result of the first work-related accident. And as a result of these two accidents, the ALJ found claimant was permanently and totally disabled under K.S.A. 44-510(c).

The respondent has appealed both docketed claims asserting a variety of errors. Relating solely to the first accident on September 21, 2003, respondent maintains claimant's recovery should be limited to a functional impairment to his right hip only because claimant's present inability to work stems from a previous injury over 30 years ago and the day to day deterioration that occurred since that injury. While respondent concedes the compensability of claimant's right hip injury only, it maintains that it has, at all times, been willing and able to accommodate claimant's resulting restrictions from that injury and that his present inability to work is unrelated to the compensable accident. Thus, claimant is not, in respondent's view, entitled to permanent total disability status as work has been made available to him.

As for the second accident, Docket No. 1,020,284, respondent maintains claimant failed to establish that he sustained a personal injury by accident that arose out of and in the course of his employment. And respondent disputes the nature and extent of claimant's disability. Distilled to its essence, respondent maintains the accident on November 13, 2004 was the natural and probable result of an earlier injury and the deterioration claimant had in his left hip and the giving-way claimant experienced while working for respondent in his accommodated position, was unrelated to the 2003 accident.

The claimant argues that the ALJ's Award should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a compensable injury on September 21, 2003 when he was loading some rock into a customer's vehicle. As he bent over to pick up a bag of rock, he was thrown off balance and fell to the ground, landing on his right hip. An ambulance was called and claimant was taken to the hospital.

Claimant was treated by Dr. Stanley Jones, who diagnosed a fracture at the base of the neck of his right hip that required surgery. On September 29, 2003, claimant had surgery which included a partial hip replacement. By mid-October he was complaining of aching, muscle spasms and pain in his right thigh and pain in the knee. His hip was x-rayed and an MRI of the knee was performed to rule out a cartilage tear. The MRI showed degenerative changes but no fracture, and the claimant was given medications to relieve the pain. The MRI to his spine revealed a minimal central bulge and small annular tear with no spinal stenosis or prominent encroachment at L4-5 and L5-S1. A bone scan was also ordered which revealed arthritis in the right knee. Dr. Jones found that the result of these tests failed

to explain the source of claimant's right knee pain and the spasms in his thigh. Thus, he referred claimant to Dr. Pollock for a second opinion.

Following a consultation with Dr. Pollock, it was decided that claimant's right hip would be revised so as to tighten up the hardware. Following that procedure in March 2004 claimant's hip was more secure, but his problems in the knee continued and he also began to have problems with his balance. Claimant had also developed a limp and was walking with a cane.

Dr. Jones continued to treat the claimant until September 2, 2004, when he was released to return to work with restrictions. These restrictions included a lifting limitation of 5 pounds and his work time was limited to 4 hours per day. Up to this point, claimant had not been working since his September 21, 2003 accident.

Claimant was assigned as the soft lines greeter in the fitting rooms, and attempted to work his full 4 hour shift, but was unable to continuously make it through. According to claimant, he was unable to tolerate the work activities without significant pain. Claimant would notify Dr. Jones of his difficulties on each occasion that he could not work a full shift. Then, on October 4, 2005, Dr. Jones altered the restrictions to limit claimant's work hours to 2 hours a day, maximum, allowing him to leave as necessary due to pain and to alternate sitting and standing. Claimant continued to appear for work, but was frequently unable to work more than 15 minutes, using either a cane or a walker to make it to and from his workstation. His pain was not only in his right knee, groin and hip, but also now in the left groin and knee.

On October 18, 2004, claimant was found to be at maximum medical improvement (MMI) and his 2 hour working restriction was continued. Claimant was still having pain in his right knee which Dr. Pollock apparently concluded was due to the length discrepancy between claimant's left and right legs. Over 30 years ago claimant had a hip prosthesis implanted in his left hip. This procedure left his left leg significantly shorter than his right. Both Dr. Pollock and Dr. Jones suggested claimant have his left hip surgically replaced, a procedure claimant apparently is not interested in at this juncture.

Respondent contacted claimant and advised him that he needed to return to work at an accommodated position, which the respondent was making available to him in the dressing area. This directive was apparently in response to a letter authored by Dr. Jones who indicated the reason claimant was limited in his work activities was due to his left hip and the difference in leg length.<sup>3</sup> Claimant was to report to work for a 5 hour period on November 14, 2004 to work as the soft lines greeter in the fitting room. This position would purportedly allow claimant to use his assistive devices and sit and stand as needed. Respondent advised that if claimant did not appear he would be terminated.

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<sup>3</sup> Jones Depo. at 33.

Claimant appeared for work as requested. This 5 hour shift was the longest period he had been required to work since the date of his accident. He went to work with his cane and went to his assigned work position. As he worked through his shift, he became more fatigued.

Well, I just -- I was just tired and kept getting tireder [sic] and tireder [sic], and my legs were just getting weaker and weaker because I hadn't been on them that long since the surgery, my accident, so I was trying to do what I was supposed to do.<sup>4</sup>

Claimant estimated he spent from 50 to 60 percent of his time moving around. He indicated he could not sit or stand for a long time and that the more he did, the more tired and weak he became. Then, as he went to stand up and pivot to shut a door, he felt severe pain in his left hip and down into his left knee, causing him to fall face forward into a wall.<sup>5</sup> He caught himself before falling and a co-worker called an ambulance. Claimant was hospitalized for 2 days.

Claimant was seen by Dr. Jones and advised that he should have the left hip repaired. According to Dr. Jones, claimant is unable to work until the left hip is repaired. Dr. Jones met with claimant and Debbie Sublett, the respondent's case manager, and advised them both that claimant will further injure himself if he returns to work and so, to protect both the employee and the employer, claimant will not be allowed to return to work.

Dr. Jones ultimately rated claimant with a 20 percent permanent impairment of function of the right hip. He also opined that claimant bears a 100 percent task loss based upon the vocational analysis done by Jon Rosell. When deposed, Dr. Jones provided testimony that was, at times helpful and at other times, somewhat difficult to understand. Upon direct examination by claimant's counsel, Dr. Jones testified that claimant was suffering from a post surgical right and left hip replacements, bursitis in the left hip and bilateral arthritis to the knees, all of which were caused or aggravated by his September 21, 2003 accident.<sup>6</sup> But in October 2004, he told respondent that it was the left hip and shortened leg that was keeping him from working, not the condition in the right.

Yet, when questioned about why, up until September 21, 2003, claimant was able to perform his job duties without difficulty, he explained that "[h]e had essentially a normal hip and was getting by with his normal hip. And when he breaks that and uses a prosthesis, and so you know with a three inch shortening he can't do it, plus the arthritis in his knees."<sup>7</sup> He further testified that the fall on November 14, 2004 aggravated or accelerated claimant's

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<sup>4</sup> R.H. Trans. at 17.

<sup>5</sup> *Id.* at 18.

<sup>6</sup> Jones Depo. at 29-30.

<sup>7</sup> *Id.* at 33.

condition in his left hip, causing him to begin to feel the pins that were installed some 30 years ago, a complaint the claimant did not have before his November 14, 2004 fall. Then in December 2004, after claimant fell again, he opined that claimant should not work until the left hip is repaired as he will likely fall again given his pain and unsteadiness.

Claimant saw Dr. John Schurman on December 29, 2004, at the request of respondent's attorney. Dr. Schurman examined the claimant and opined that claimant had status post right hip endoprosthesis for hip fracture, posttraumatic osteoarthritis of the left hip with residual internal flexion.<sup>8</sup> It was the doctor's opinion that "[t]here is no doubt that the arthrosis on the left is chronic and that it ultimately will require arthroplasty." And that claimant's "described fall [on November 14, 2004]. . . has no relationship to causation and any aggravating factor would be minimal."<sup>9</sup> It is Dr. Schurman's opinion that for claimant's situation to be resolved he will need to have left hip replacement surgery.

Claimant was also evaluated by Dr. Phillip Mills on March 10, 2005, at his own lawyer's request. Dr. Mills testified that claimant had a right hip fracture with right hip unipolar prosthesis placement, requiring a second procedure for cementing the prosthesis, degenerative arthritis of the left hip and bilateral knees, and right upper extremity pain and possible carpal tunnel syndrome.<sup>10</sup> He opined that based on the information available claimant's right hip fracture is casually related to an injury on September 21, 2003, that claimant's upper extremity pain was due to his having to use a cane to get around, that the arthritis in claimant's knees and left hip, while a preexisting problem, was aggravated by the September 2003 accident, and finally that claimant's left hip was further aggravated by the incident on November 13, 2004.<sup>11</sup>

Dr. Mills believed that claimant was at MMI and had a 30 percent permanent partial impairment to the whole body plus a 1 percent impairment to the left lower extremity for additional problems as a result of favoring that side after the November fall (1% whole body), and a 1 percent impairment of the upper extremity for additional problems from using a cane (1% whole body). He also opined that claimant may have a 10 percent impairment for carpal tunnel syndrome (6% whole body) if studies were to show that carpal tunnel were present. He opined that claimant was essentially and realistically unemployable, whether considering just the right hip or the right and left hip together. Finally, he testified claimant bears a 100 percent task loss due to his injury.

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<sup>8</sup> Schurman Depo., Ex. 2 at 1.

<sup>9</sup> *Id.*, Ex. 2 at 2.

<sup>10</sup> Mills Depo., Ex. 2 at 6.

<sup>11</sup> *Id.*

Jon Rosell, the individual who performed the vocational analysis of claimant's past work history, testified that claimant is incapable of working a full-time job due to his physical restrictions, age and education.

The ALJ concluded claimant was permanently and totally disabled under K.S.A. 44-510(c) as a result of the first accident in September 2003. He based that opinion not only upon Jon Rosell's testimony, but based upon that offered by Dr. Jones and Dr. Mills. Both physicians testified that claimant is presently unable to work. While respondent urges the Board to reflect carefully upon Dr. Jones' testimony and find that claimant's inability to work is due to his left hip, thus relieving it of any liability for that extent of his condition, the Board is not persuaded.

Like the ALJ, the Board finds claimant is permanently and totally disabled as a result of the September 21, 2003 accident. When viewed in its entirety, it appears that while Dr. Jones attributed claimant's inability to work to the long standing condition in his left hip, he failed to appreciate the legal consequences of the balance of his testimony. Dr. Jones' testimony establishes that claimant had no left hip complaints before his September 21, 2003 accident. He was performing his job without difficulty in spite of the leg length differential. While his left hip was compromised and had been so for over 30 years, his right hip remained unimpaired. And after the September 21, 2003 accident and subsequent surgery, he developed an aggravation of the arthritis in his right knee and over time began to complain of left groin pain. He was deconditioned by his lack of work and was compelled by respondent to appear for work, to alternatively sit and stand for a 5 hour period, a length of time that he was not physically conditioned to do. He became fatigued and when he stood to perform his job duties, his left leg failed. The fact that he fell is, in the Board's view, the natural and probable result of his September 21, 2003 accident, not a factor of his earlier injury or the day to day activities he experienced over the past 30 years.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,<sup>12</sup> the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

Accordingly, the Board affirms the ALJ's Award finding claimant permanently and totally disabled as a result of the September 21, 2003 accident. Given this finding, the balance of respondent's arguments with regard to Docket No. 1,020,284 are moot.

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<sup>12</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

Finally, respondent argues that claimant failed to comply with K.A.R. 51-9-5 which provides as follows:

An unreasonable refusal of the employee to submit to medical or surgical treatment, when the danger to life would be small and the probabilities of a permanent cure great, may result in denial or termination of compensation beyond the period of time that the injured worker would have been disabled had the worker submitted to medical or surgical treatment, but only after a hearing as to the reasonableness of such refusal.

The respondent did not argue the effect of this regulation to the ALJ and the Board is unwilling to address any issue that was not presented to the ALJ.<sup>13</sup>

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated July 28, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary A. Winfrey, Attorney for Claimant  
James B. Biggs, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>13</sup> As best as can be gleaned from the record, respondent did not offer this surgery to the claimant and based upon the arguments set forth in this appeal, contends the left hip is not respondent's responsibility.